

**TJ Signs, Inc. d/b/a American Signcrafters and Jose Nieves.** Case 29-CA-18509

November 8, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On August 11, 1995, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.<sup>1</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, TJ Signs, Inc. d/b/a American Signcrafters, Bayshore, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge incorrectly stated that employee Wyatt was hired on August 23, 1994; Wyatt was hired on August 24, 1994.

The judge's conclusions of law are amended to read "By denying Jose Nieves employment because it believed that he was a member of a labor organization, Respondent violated Section 8(a)(1) and (3) of the Act."

*James P. Kearns, Esq.*, for the General Counsel.  
*Perry S. Heidecker, Esq. (Marshall M. Miller Associates, Inc.)*, of Lake Success, New York, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on June 5, 1995. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, interrogated its employees about their union activities and denied employment to Jose Nieves because he was a member of Local 137, Sheet Metal Workers International Association. Respondent denies that it has violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs

filed by the General Counsel and Respondent on July 10, 1995,<sup>1</sup> I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a New York corporation located in Bayshore, New York, is engaged in manufacturing and distributing neon signs and other signs. Respondent annually receives materials valued in excess of \$50,000 directly from points outside the State of New York.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 137, Sheet Metal Workers International Association is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

*A. The Facts*

It is undisputed that on August 8, 1994, Jose Nieves went to Respondent's premises and met with Jeffrey Petersen, Respondent's president and sole owner. Nieves told Petersen that he was looking for a job, and Petersen took him around the shop. Nieves did not go to work for Respondent. General Counsel contends that Petersen promised Nieves a job but reneged when he came to believe that Nieves belonged to Local 137. Respondent maintains that Petersen did not offer Nieves a job because there were no positions available when Nieves applied for work. The resolution of the issues in the instant case depends entirely upon a determination as to the relative credibility and reliability of the witnesses.

Richard Quaresima, the business representative of Local 137, testified that in 1993 and 1994 he spoke to Petersen on several occasions trying to obtain employment for Local 137 members.<sup>2</sup> In May 1994, the Union picketed the worksites of Respondent. Unfair labor practice charges were filed by Respondent and a settlement agreement was entered into whereby the Union agreed to stop picketing. Quaresima knew that Respondent had a help wanted sign outside the shop: in August 1994, he instructed union members to seek work from Respondent and several members applied for work at the shop.

Petersen testified that he had known sheet metal operator Gino Marchese for years and that he was aware of his membership in Local 137. Marchese, who was unemployed, told Petersen that he would be willing to come to work for Respondent and that he was not concerned about any problems that might arise. On August 1, 1994, Petersen hired Marchese to do sheet metal work. The payroll records show that Marchese began work on August 12 or 13. Petersen cited Marchese's affiliation with Local 137 as proof that he was willing to hire union members and harbored no animus against them. Local 137 Representative Quaresima testified that Marchese came to the union hall on August 9 and paid a fee to obtain a withdrawal card; Marchese informed

<sup>1</sup> Fn. 2 of Respondent's memorandum of law purports to state certain facts. However, these facts do not appear anywhere in the record and are not based on the testimony of any witness. I shall disregard fn. 2 of Respondent's memorandum.

<sup>2</sup> Petersen is an ex-member of Local 137.

Quaresima that he was going to California. Union records show that the withdrawal was effective August 12, 1994.

Jose Nieves had been working as an inventory clerk for about 1 month. On Monday, August 8, 1994, Nieves worked from 8:30 a.m. to 3:30 p.m. After he finished work, his friend Richard Mercado called and asked to borrow his camera. Nieves and Mercado traveled by car to Respondent's shop. Mercado took a picture of a help wanted sign outside the shop and told Nieves that he thought Respondent had not given him a job because he was a member of Local 137. While Mercado went off to make a telephone call, Nieves went into Respondent's shop to see if he could get work. Nieves is not a member of Local 137.

According to Nieves, when he entered the shop, he met Petersen who identified himself and asked whether Nieves had any experience. Nieves replied that he had some experience, but not a lot. Nieves informed Petersen that he had worked for a sign company in Florida and had done a little bit of sheet metal work. Petersen told Nieves that he wanted to hire helpers. Petersen asked Nieves if he had worked with the type of machines in the shop and Nieves replied that he was familiar with one of the machines. Petersen introduced Nieves to his foreman. After the brief tour of the shop, Petersen took Nieves upstairs to his office and asked whether Nieves would come to work for him. Nieves said he was willing to work for Petersen; Petersen was offering \$7.50 per hour to start with the prospect of a lot of overtime, whereas Nieves was currently earning only \$5 per hour as an inventory clerk. The two men discussed whether Nieves would have to give 1 week's notice at his job, and they decided that Nieves would tell his current employer that Friday would be his last day. Petersen said that he needed someone by next week. Then Petersen asked Nieves if he had any family responsibilities that would affect his work, and Nieves replied that he did not. Petersen asked Nieves, "Are you involved with any union?" Nieves said that he was not. Petersen asked Nieves, "Are you affiliated with any union?" Again, Nieves said that he was not. Petersen said something about "starting his union and about initiation fees." When Nieves replied that he did not know anything about that, Petersen said that he would explain in detail when Nieves began work. Petersen gave Nieves his business card and asked him to call Thursday morning with the telephone numbers of his references. If Nieves did that, then Petersen would call Nieves back on Thursday evening.

Nieves testified that when he telephoned Peterson on Thursday morning, Peterson asked him if he knew Richard Quaresima. Nieves denied knowing Quaresima. Then, Petersen said that Quaresima knew Nieves, and he asked whether Nieves knew anything about Local 137. Nieves said that he did not. Petersen went on to say that Quaresima had told him that Nieves came from Local 137. Nieves said that he did not know anything about that. Petersen said, "I don't know what the deal is . . . something else don't add up here." Nieves was upset; he told Peterson that he had already given notice at his current place of employment and that his replacement had been hired. Nieves asked Petersen what he would do for a job, and Peterson replied that he could not help him.

Nieves testified that he did not know Quaresima when he had the conversation with Petersen. However, after the conversation with Petersen, Nieves called his friend Mercado

who told him that Quaresima was the Local 137 business agent. Quaresima testified that he never called Petersen to tell him that Nieves was affiliated with the Union.

Jeffrey Petersen testified that August is a busy month in which Respondent receives many orders from store owners planning to take advantage of the fall shopping season. As set forth above, Petersen had hired Marchese on August 1, 1994, as a sheet metal mechanic. Petersen recalled that Nieves came to the shop in the morning on August 8 and that the two men spoke briefly. Nieves said he wanted to work for Respondent and that he had done sign work in Florida. Nieves did not mention duct work. According to Petersen, he and Foreman Theodore Dybus walked Nieves around the shop briefly to ascertain his abilities and his knowledge of the various pieces of equipment.<sup>3</sup> Petersen told Nieves that several people had been hired and that he would keep Nieves' name and number on file. Petersen testified that he did not offer Nieves a job and that he did not ask Nieves whether he was affiliated with a union. Petersen stated that he never heard from Nieves again.

Petersen testified that Nieves would probably have worked out in an entry level position but that he was not hired because all the entry level positions had been filled. Petersen also testified that Nieves did not want an entry level position because he had skills. Petersen emphasized that Nieves was not hired because Respondent had no need for his services as all entry level positions had been filled. In fact, Respondent had hired more people than it needed because a certain amount of attrition was to be expected. On cross-examination by counsel for the General Counsel, Petersen acknowledged that his payroll records show that on August 15, Jimmy Amentler was hired as an installation helper at a rate of \$9 per hour. Amentler had "some experience" in the field. In addition, the payroll records show that on August 23, 1994, Keith Wyatt was hired as a porter at a wage rate of \$7.50 per hour. Petersen testified that this is an entry level position. Although Petersen stated that the payroll record shows the date an employee commenced work and not the date of actual hire. Respondent offered no further evidence to show when Amentler and Wyatt were hired.

I have decided to credit the testimony of Nieves about the events of August 8, 1994. Nieves was a forthright witness who gave his testimony in a cooperative albeit unsophisticated manner. I shall not rely on the testimony of Petersen wherever it is contradicted by more credible evidence. I find that Petersen's testimony was inconsistent with the documentary evidence. Although Petersen stated that he would have hired Nieves, he testified that he did not hire Nieves on August 8 because he could not use him. However, Respondent's records show that Amentler was hired as an installation helper and began work on August 15. Amentler had "some experience," which is exactly what Nieves had. Further, Wyatt was hired on August 23 into the entry level job of porter at the same wage rate that Nieves had agreed on with Petersen. Nieves, who was only earning \$5 per hour as an inventory clerk was willing to work for \$7.50. Further it is undisputed that Respondent had a help wanted sign outside its premises on August 8, 1994. Finally, when Nieves walked into the

<sup>3</sup>Dybus was called to testify by Respondent. It is clear to me that Dybus has no actual recollection of ever meeting Nieves. I shall not rely on any of Dybus' testimony.

shop and inquired about a job, Petersen did not tell him that all the positions had been filled and that there was no work available. Instead, Petersen took the time to walk Nieves around the shop and discuss the machinery with him. Since August was admittedly the busy season, it is not believable that Petersen would spend valuable time ascertaining Nieves' skills and experience unless Petersen in fact wanted to hire another employee.

I find that Petersen interrogated Nieves about his union activities and that Petersen offered Nieves a job, but reneged on the offer when he came to believe that Nieves was a member of Local 137. Respondent thus violated Section 8(a)(1) and (3) of the Act. *Gatliff Business Products*, 276 NLRB 543 (1985).

#### CONCLUSION OF LAW

By interrogating Jose Nieves about his membership in a labor organization, Respondent violated Section 8(a)(1) of the Act. By denying Jose Nieves employment because it believed that he was a member of a labor organization, Respondent violated Section 8(a)(3) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily denied employment to Jose Nieves, it must offer him employment and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, TJ Signs, Inc. d/b/a American Signcrafters, Bayshore, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Refusing to hire applicants because it believes they are members of a labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

<sup>4</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Jose Nieves immediate employment in the position he would have received absent the Respondent's discrimination against him or, if that position is no longer available, to a substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination in accordance with the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Bayshore, New York, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.<sup>6</sup>

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT refuse to hire applicants for employment because we believe they are members of Local 137, Sheet Metal Workers International Association, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jose Nieves immediate employment in the position he would have received or, if that position is no longer available, to a substantially equivalent position, and

we will make Jose Nieves whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

TJ SIGNS, INC. D/B/A AMERICAN SIGN-  
CRAFTERS